

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Petition of USTelecom For Forbearance Under
47 U.S.C. § 160(c) From Enforcement of
Certain Legacy Telecommunications
Regulations.

WC Docket No. 12-61

**COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
AND THE PEOPLE OF THE STATE OF CALIFORNIA ON PETITION FOR
FORBEARANCE OF THE UNITED STATES TELECOM ASSOCIATION**

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I. INTRODUCTION

The California Public Utilities Commission and the People of the State of California (CPUC or California) submit these comments in response to the petition for forbearance filed by the United States Telecom Association (USTelecom) at the Federal Communications Commission (FCC or Commission) on February 16, 2012, in the above captioned docket.¹ The USTelecom Petition seeks forbearance from enforcing certain “legacy telecommunications regulations” on the basis that they are “outdated” and have no relevance in a broadband world.² USTelecom states that “forbearance is required because: (1) enforcement of the legacy telecommunications regulations that are the subject of this Petition are not necessary to ensure that rates or practices are just, reasonable, and nondiscriminatory; (2) enforcement of these regulations is not necessary to protect consumers; and (3) forbearance from applying the legacy telecommunications regulations at issue is consistent with the public interest. 47 U.S.C. § 160(a).”³

The FCC directed parties to file their comments on USTelecom’s petition by “clearly identifying, in their Table of Contents and/or opening summary of their comments and of their reply comments, which of the seventeen regulatory categories, their comments are addressing.”⁴ Pursuant to the Public Notice, the CPUC identifies the following categories on which it will provide comment:

¹ *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61 (filed Feb. 16, 2012).

² *Id.*, at pp. 1, 3.

³ *Id.*, at p. iii.

⁴ Public Notice DA 12-352, at p. 2.

Category 1: Equal Access Scripting Requirement

Category 4: Part 32 Uniform System of Accounts (47 U.S.C. § 220(a)(2), 47 C.F.R. §§ 32.1-2.9000)

Category 5: Property Record Rules (47 C.F.R. §§ 32.2000(e) & (f))

Category 9: Rules Governing Notices of Network Changes (47 C.F.R. §§ 51.329(a)(2), 51.333(a)-(f), 52.333(b))

Category 16: Rules Governing Recording of Telephone Conversations with Telephone Companies (47 C.F.R. § 64.501)

For the reasons discussed below, the CPUC opposes certain of USTelecom's requests for forbearance. The CPUC notes that silence on any issue or category does not indicate support or opposition to USTelecom's request. The CPUC reserves the right to file reply comments on categories not addressed in these comments.

II. DISCUSSION

A. Category 1: Equal Access Scripting Requirement (USTelecom Petition Section A)

In its Petition, USTelecom asks for forbearance from the application of the Equal Access Scripting requirement to all small and mid-sized independent incumbent local exchange carriers (ILECs) that remain subject to this requirement. That requirement compels small and mid-size ILECs to inform new customers that they can obtain wireline long distance service from a provider other than the ILEC from which the customer obtains local exchange service. The ILEC must, upon request, read the customer a random-ordered list of available stand-alone wireline long distance service providers.

USTelecom attempted to obtain a waiver from the FCC's continued application of this requirement in 2008.⁵ The CPUC opposed USTelecom's petition and recommended that the requirement be continued in the service territories of rural ILECs where the state has not opened the service territory to local wireline competition.⁶ For the same reasons stated in those comments, which the CPUC incorporates by reference herein, the CPUC continues to oppose USTelecom's request for forbearance of the equal access scripting requirements for these rural carriers. USTelecom relies on the same arguments as its earlier petition and offers no new information, evidence, or analysis in its current petition that would compel a different result.

As previously explained, the CPUC has not extended local exchange competition beyond the territories of AT&T, Verizon, SureWest Communications, and Frontier Communications. As a consequence, the territories of our rural rate of return ILECs by law are not open to local exchange competition from other wireline service providers. In many of these territories, the only provider of local wireline service is the ILEC, and in those areas, the ILEC is the only provider a customer can call to establish local exchange service.

⁵ *Petition of the United States Telecom Association for Waiver from Application of the Equal Access Scripting Requirement*, WC Docket No. 08-225 (filed Nov. 10, 2008).

⁶ Comments of the California Public Utilities Commission, WC Docket No. 08-225 (filed Sept. 11, 2009).

In 2007, the FCC granted forbearance from enforcement of the equal access scripting requirement with respect to AT&T, Qwest, and Verizon LECs and their independent ILEC affiliates.⁷ The FCC stated:

The EA [equal access] Scripting Requirement was designed to foster fair competition in the provision of stand-alone long distance service at a time when competition in the provision of stand-alone long distance services was nascent and there was little, if any, competition in the provision of local exchange service. Since that time, market conditions have changed substantially, greatly reducing the benefits of the EA Scripting Requirement.

In reaching this conclusion, the FCC relied on several findings. First, the FCC found that the stand-alone long distance market was becoming a “fringe market,” noting that “the stand-alone long distance competition that the EA Scripting Requirement was designed to protect has largely given way to competition between service bundles that include both local exchange and long distance service.”⁸ Second, the FCC said that those customers who still avail themselves of stand-alone long distance service “now have additional options available for making long distance calls.”⁹ The scripting requirement only required the ILEC to inform the customer of alternative *wireline* long distance providers, which the FCC found resulted in an “artificially narrow focus” of the scripting

⁷ *In the Matters of Section 272(f)(1) Sunset of BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review of Separate Affiliate Requirements of Section 64.1903 of the Commission’s Rules; Petition of AT&T Inc. For Forbearance Under 47 U.S.C. 160(c) with Regard to Certain Dominant Carrier Obligations for In-Region Interexchange Services*, WC Docket No. 06-120; CC Docket No. 00-175, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, 16442, 16498-16502, at paras. 3, 117-127 (2007).

⁸ *Id.*, at para. 121.

⁹ *Id.*, at para. 122.

requirement that could “confuse or mislead consumers and cause them not to investigate alternative means of making long distance calls.”¹⁰ Finally, the FCC noted that the scripting requirement “imposes unnecessary costs on the BOCs [Bell Operating Companies].”¹¹ For these reasons, the FCC granted AT&T’s request for forbearance. Based on the same reasoning, forbearance was also extended to the BOCs’ independent incumbent LEC affiliates. The FCC did not extend the forbearance to small and mid-sized ILECs.

The conditions justifying the forbearance applied to the BOCs and their ILEC affiliates in 2007 do not similarly justify forbearance of the equal access scripting requirement for certain of the ILECs as requested by USTelecom. ILECs that are protected from local wireline competition are not similarly situated to the “BOCs”, but rather are the beneficiaries of a prohibition against local exchange wireline competition in their service regions. None of the reasons Petitioners cite from the FCC’s decision granting AT&T’s forbearance request are met in this instance. This is because none of the circumstances integral to the FCC’s 2007 analysis are applicable to the small ILECs in California. Thus, the FCC’s 2007 rationale for applying the forbearance criteria to AT&T et al. cannot attach to the facts here, and cannot justify waiver of the equal access scripting requirement USTelecom seeks for rural ILECs protected from local wireline competition.

¹⁰ *Id.*

¹¹ *Id.*, at para. 124.

USTelecom's claim concerning "significant changes in the competitive landscape" does not compel forbearance in territories of small ILECs that are protected by law from wireline local exchange competition. As the CPUC discussed in its 2009 comments, USTelecom did not then, nor does it now, show that cable competition has the same impact on rural and small ILECs as alleged for the territories of AT&T, Verizon and Qwest.¹² While cable companies may offer service in the territories of California's small rural ILECs, they cannot offer local exchange service because they cannot lawfully interconnect or obtain local telephone numbers in rate centers within territories where competition is barred. Likewise, USTelecom made no showing in either its 2008 petition or its current petition that wireless service offers ubiquitously available local phone service (and therefore is a long distance alternative equivalent to the availability of stand-alone wireline long distance service) in the rural ILEC territories as was found to be the case for AT&T, Verizon, and Qwest. As for "over-the-top" VoIP providers, USTelecom did not demonstrate back in 2008 what percentage of small ILEC customers have broadband service, on which VoIP providers depend, and thus could not demonstrate the extent to which the VoIP alternative is available for those customers.¹³ USTelecom offers no new information or analysis to make an effort to demonstrate that broadband is ubiquitously available in the territories of these small ILECs. Thus, USTelecom's claim that significant changes in the competitive landscape have affected

¹² See Comments of the California Public Utilities Commission, WC Docket No. 08-225 (filed Sept. 11, 2009), at pp. 6-7.

¹³ See *ibid.*, at p. 8.

small ILECs in the same ways it has affected their larger counterparts is not true in California. What the FCC found to apply to AT&T, Verizon, and Qwest does not necessarily apply to small ILECs. With respect to California, and to other areas as well, USTelecom has not demonstrated that the small ILECs lack market dominance in their service territories. In fact, their dominance in their service territories is protected by law in California. Because USTelecom has not shown that small and mid-sized ILECs that are protected from local competition are similarly situated legally or practically to their larger counterparts AT&T, Verizon, and Qwest, the FCC should not extend forbearance from the equal access scripting requirement to these companies.

B. Category 4: Part 32 Uniform System of Accounts (47 U.S.C. § 220(a)(2), 47 C.F.R. §§ 32.1-2.9000) (USTelecom Petition Section D)

Category 5: Property Record Rules (47 C.F.R. §§ 32.2000(e) & (f)) (USTelecom Petition Section E)

In its Petition, USTelecom seeks forbearance for all price cap LECs from the Part 32 Uniform System of Accounts (USOA)¹⁴ and from property record requirements in §§ 32.2000(e) and (f) of the FCC's rules.¹⁵ The CPUC opposes USTelecom's request to the extent that these rules are necessary to properly reform the separations process. The Federal-State Joint Board is still considering reforms to the separations process. The FCC should consider what may still be needed (reporting-wise) from carriers in order to reform the separations process.

¹⁴ USTelecom Petition, at p. 34.

¹⁵ USTelecom Petition, at p. 43.

On March 15, 2012, in CC Docket No. 80-286, the FCC issued a Further Notice of Proposed Rulemaking (*Separations FNPRM*) seeking comment on extending for two years the current freeze of jurisdictional separations category relationships and cost allocation factors in Part 36 of the FCC's rules.¹⁶ The current freeze was implemented pending comprehensive reform of the jurisdictional separations process.¹⁷ The *Separations FNPRM* notes that a number of jurisdictional separations reform issues were referred to the Federal-State Joint Board to prepare a recommended decision. The *Separations FNPRM* also notes that the recent comprehensive reforms of the universal service and intercarrier compensation systems may significantly affect the Joint Board's analysis of interim and comprehensive reform of the jurisdictional separations process, and accordingly seeks comment on whether an additional two-year freeze would provide sufficient time for the Joint Board to complete its review and recommendations.¹⁸ Since the Joint Board is still reviewing and considering revisions to the separations process, it is unknown at this point what reports may still be required to implement any reforms. For this reason, the CPUC believes it is premature to consider USTelecom's request at this time.

¹⁶ *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Further Notice of Proposed Rulemaking (rel. Mar. 15, 2012) at para. 1 (*Separations FNPRM*).

¹⁷ *Id.*, at para. 5; see also, *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382, 11386, at para. 5 (2001) (*Separations Freeze Order*).

¹⁸ *Separations FNPRM*, at paras. 11-12.

C. Category 9: Rules Governing Notices of Network Changes (47 C.F.R. §§ 51.329(a)(2), 51.333(a)-(f), 52.336(b)) (USTelecom Petition Section I)

USTelecom requests forbearance from application to all covered carriers of provisions of Part 51 that require a carrier-initiated filing and a Bureau-initiated public notice of short term network changes when carriers post notice of the network change on their website. These rules also establish a process for third parties to protest the retirement of copper loops. USTelecom asserts that an ILEC's ability to upgrade or modify its network should not be delayed following that notice and no additional approvals or opportunity for delay should be permitted following such notice. It claims that forbearance from further application of these requirements is in the public interest because "it will allow providers to upgrade and modify their IP networks more quickly, in stark contrast to the current regime."¹⁹

Specifically, USTelecom seeks forbearance from §51.333(a)-(f) to the extent that these provisions require the issuance of a public notice by the Bureau before network changes can be implemented, even though the carrier has made a filing with the Commission, provided notice on its website, and individually served the appropriate interconnecting service providers. The CPUC opposes eliminating this rule because CPUC rules²⁰ on retirement of copper loops²¹ are dependent on the FCC notice and

¹⁹ USTelecom Petition, at p. 59

²⁰ *Decision Adopting Process Governing Retirement By Incumbent Local Exchange Carriers Of Copper Loops And Related Facilities Used to Provide Telecommunications Services* (D.08-01-005), November 6, 2008.

²¹ By copper loop, we refer to the copper "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user

implementation requirements under §51.333(a)-(f). The CPUC adopted rules that require ILECS to file *concurrently* with our Communications Division any notices of network changes that the carriers file with the FCC for fiber to the home (FTTH) or fiber to the curb (FTTC) deployment that results in the retirement of copper plant.²² Carriers filing such FCC notices with the CPUC allows the CPUC to monitor ILEC copper retirement practices. Moreover, requiring the ILEC to serve notice of the copper retirement upon all CLECs that are interconnected with the ILEC facilitates negotiations to access the loop. In California, within 20 days of the date that the notice of network change has been filed with the FCC, the CLEC must request, in writing, negotiations with the ILEC either to purchase the entire copper loop from the ILEC or to reach an agreement with the ILEC on price and terms and conditions for continued access to loop facilities.²³

The FCC has found, and we concur, that “[s]uch notices will ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities”.²⁴ The FCC has rules in place to give competitors that lease lines from an ILEC proposing to remove copper facilities the right to file objections

customer premises, including inside wire owned by the incumbent LEC.” *See Triennial Review Order* at n. 638.

²² D.08-11-033, pp. 42-23

²³ D.08-11-033, p. 3

²⁴ *In the Matter of Review of the Section 251 Unbundling Requirements of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 19,020, FCC 03-36 (rel. Aug. 21, 2003), *modified on recon.*, *In the Matter of Unbundled Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533, FCC 04-290 (rel. Feb. 4, 2005) (“TRRO”), ¶ 282.

to gain time to smoothly transition service. Under the FCC's rules, ILECs must provide a minimum of 90 days of notice to competitors that will be directly affected by planned copper retirement.²⁵ Further, ILECs must notify affected competitors directly if they plan to implement the retirement in fewer than six months. Accordingly, the CPUC does not agree with USTelecom's argument that "these rules require multiple duplicative public filings and involve unnecessary delay and uncertainty."²⁶

The CPUC opposes eliminating the detailed rules regarding certificate of service, implementation dates, objection procedures, response to objections, and resolution of objections found in 47 C.F.R. § 51.333. We believe a national uniform notice and protest procedure is less onerous to the industry than having to comply with potentially 50 different procedures that may be the result if the FCC eliminates its requirements. Moreover, if USTelecom believes that there provisions of 47 C.F.R. § 51.333 that are resulting in unnecessary delay, superfluous costs and inefficiencies, it should be more specific in identifying those provisions.

D. Category 16: Rules Governing Recording of Telephone Conversations with Telephone Companies (47 C.F.R. § 64.501) (USTelecom Petition Section P)

USTelecom requests forbearance from application to all covered carriers of Section 64.501, which requires a telephone common carrier to obtain verbal or written consent of all parties prior to recording a telephone conversation between the telephone

²⁵ *Id.* at (f).

²⁶ USTelecom Petition, at p. 56.

common carrier and any member of the public. USTelecom asserts that forbearance is appropriate because “the rule has been rendered moot by the development of a robust body of privacy laws at the federal and state level.”²⁷ Specifically, USTelecom points to the Federal Wiretap Act, 18 U.S.C. §§ 2510-2522. However, USTelecom overstates the strength and effect of that federal law. While the FCC’s rule requires consent of all parties to the conversation, the federal statute only requires one party to have knowledge that the call is being recorded.²⁸ Likewise, only 12 States, including California, require all parties to consent to interception or recording when that interception is done by a private party not under the color of law.²⁹ Therefore, USTelecom’s claim that “there are myriad state and federal protections... that are better suited to protect the privacy of consumers than the Commission’s regulations”³⁰ is simply not true. The CPUC opposes eliminating the FCC rule in favor of a federal statute that provides less stringent protection to consumers.

USTelecom further asserts that there is no reason to treat telephone companies differently from other companies when it comes to rules governing the recording of conversations with customers and also claims that the rule represents an obligation

²⁷ USTelecom Petition, at p. 70.

²⁸ See 18 U.S.C. § 2511(2)(d).

²⁹ The twelve States are: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington. In some states, the all-party consent requirement applies only to oral communications. In other states, the requirement applies to both voice and data communications.

³⁰ USTelecom Petition, at p. 71.

imposed on only a subset of competitors in the communications marketplace.³¹ However, telephone companies are situated differently than other businesses because they control the very network over which communications are sent. Moreover, if USTelecom is concerned that the requirement is imposed only on a subset of competitors (telephone common carriers), then perhaps the FCC should consider extending the rule to cover all carriers, as well as voice and data communications.

III. CONCLUSION

For the reasons discussed above, the CPUC opposes USTelecom's request for forbearance from certain FCC rules contained in Categories 1, 4-5, 9, and 16. The CPUC will review other comments filed on this matter and may address further categories in its reply comments as appropriate.

Respectfully submitted,

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³¹ *Id.*, at pp. 70-71.